89-955

In The

Supreme Court of the United States

October Term, 1989

MANFRED DEREWAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does the lower courts' application of the "silver platter" doctrine so as to permit the admissibility of wiretap evidence obtained by foreign authorities at the behest of United States law enforcement officials violate the Fourth Amendment guarantee against unreasonable searches and seizures?

2. Does the lower courts' refusal to dismiss the charges on grounds of government delay deny the petitioner's right to due process under the Fifth Amendment?

3. Does the lower courts' refusal to condemn the prosecution's use of a surprise witness violate the petitioner's right of confrontation under the Sixth Amendment?

4. Did the district court improperly admit evidence of unrelated conduct that occurred several years before the conduct giving rise to the instant charges?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is sought to be reviewed.

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No.

In The

Supreme Court of the United States

October Term, 1989

MANFRED DEREWAL,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner Manfred Derewal respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on September 8, 1989.

OPINIONS BELOW

The order of the United States Court of Appeals for the Third Circuit (Mansmann, Circuit Judge) denying the petitioner's petition for rehearing on October 4, 1989, is reprinted in the appendix at 1a, *infra*.

The memorandum opinion of the United States Court of Appeals for the Third Circuit (Aldisert, Circuit Judge) affirming the judgment of the district court, filed on September 8, 1989, is reprinted in the appendix at 3a, *infra*.

The opinion of the United States District Court for the Eastern District of Pennsylvania (Kelly, District Judge) is reported at *United States v. Derewal*, 703 F. Supp. 372 (E.D. Pa. 1989) and is reprinted in the appendix at 9a, *infra*.

STATEMENT OF JURISDICTION

The memorandum opinion of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Eastern District of Pennsylvania was entered on September 8, 1989. On October 4, 1989, the United States Court of Appeals for the Third Circuit denied a timely petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULE INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the Witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of counsel for his defence.

18 U.S.C. § 2. Principals:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

21 U.S.C. § 952(a). Controlled substances in schedule I or II and narcotic drugs in schedule III, IV, or V; exceptions:

> It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or

to import into the United States from any place outside thereof, any controlled substance in schedule I or II of title II, or any narcotic drug in schedule III, IV, or V of title II, except that—

(1) such amounts of crude opium and coca leaves as the Attorney General finds to be necessary to provide for medical, scientific, or other legitimate purposes, and

(2) such amounts of any controlled substance in schedule I or II or any narcotic drug in schedule III, IV, or V that the Attorney General finds to be necessary to provide for the medical, scientific, or other legitimate needs of the United States—

(A) during an emergency in which domestic supplies of such substance or drug are found by the Attorney General to be inadequate,

(B) in any case in which the Attorney General finds that competition among domestic manufacturers of the controlled substance is inadequate and will not be rendered adequate by the registration of additional manufacturers under section 303, or

(C) in any case in which the Attorney General finds that such controlled substance is in limited quantities exclusively for scientific, analytical, or research uses,

may be so imported under such regulations as the Attorney General shall prescribe. No crude opium

may be so imported for the purpose of manufacturing heroin or smoking opium.

21 U.S.C. § 960. Prohibited acts A:

(a) Unlawful acts. Any person who—

(1) contrary to section 1002, 1003, or 1007, knowingly or intentionally imports or exports a controlled substance,

(2) contrary to section 1005 knowingly or intentionally brings or possesses on board a vessel, aircraft, or vehicle a controlled substance, or

(3) contrary to section 1009, manufactures or distributes a controlled substance,

shall be punished as provided in subsection (b).

(b) Penalties. (1) In the case of a violation under subsection (a) with respect to a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than fifteen years, or fined not more than $25,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall include a special parole term of not less than three years in addition to such term of imprisonment.

(2) In the case of a violation under subsection (a) with respect to a controlled substance other than a narcotic drug in schedule I or II, the person committing such violation shall be imprisoned not more than five years, or be fined not more than

> $15,000, or both. If a sentence under this paragraph provides for imprisonment, the sentence shall, in addition to such term or imprisonment, include (A) a special parole term of not less than two years if such controlled substance is in schedule I, II, III, or (B) a special parole term of not less than one year if such controlled substance is in schedule IV.
>
> (c) Special parole term. A special parole term imposed under this section or section 1012 may be revoked if its terms and conditions are violated. In such circumstances the original term of imprisonment shall be increased by the period of the special parole term and the resulting new term of imprisonment shall not be diminished by the time which was spent on special parole. A person whose special parole term has been revoked may be required to serve all or part of the remainder of the new term of imprisonment. The special term provided for in this section and in section 1012 is in addition to, and not in lieu of, any other parole provided for by law.

21 U.S.C. § 963. Attempt and conspiracy:

> Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the contempt or conspiracy.

Federal Rule of Evidence 404(b). Other crimes, wrongs, or acts:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

STATEMENT OF THE CASE

A. Procedural Background

The petitioner Manfred Derewal was arrested on October 19, 1988, and later indicted on March 9, 1988, on charges of (1) conspiring to import phenyl-2-propanone ("P2P"), a non-narcotic controlled substance, in violation of 21 U.S.C. §§ 952(a), 960(a)(1), and 963; (2) importing P2P in violation of 21 U.S.C. § 952(a), 21 U.S.C. § 960(a)(1), and 18 U.S.C. § 2; and (3) attempting to import P2P in violation of 21 U.S.C. § 963.

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, the Honorable James McGirr Kelly presiding, Mr. Derewal was convicted on all counts. On April 12, 1989, he was sentenced to two consecutive five-year sentences.

The United States Court of Appeals for the Third Circuit (Aldisert, Circuit Judge) affirmed Mr. Derewal's convictions in a memorandum opinion filed on September 8, 1989. Mr. Derewal's timely petition for rehearing was denied on October 4, 1989 (Mansmann, Circuit Judge).

B. Basis for Federal Jurisdiction

The jurisdiction of the District Court below was based upon

28 U.S.C. § 3231.

C. Facts

Manfred Derewal is a chemist who resides in Pennsylvania and Costa Rica. The charges in this case arose from events that took place between October 1982, and August 1984, when Mr. Derewal was found to have conspired with others to import the non-narcotic controlled substance P2P from Costa Rica into the United States, to have imported 17 gallons of P2P into this country from Costa Rica, and to have attempted to import about 100 gallons of P2P from Costa Rica to the United States. P2P and another chemical, monomethylamine, were not illegal in Costa Rica when first obtained by Mr. Derewal for the expressed purposes of extracting gold and experimenting with fertilizers and insecticides. The two chemicals remained legal in Costa Rica until May 1988. P2P was legal and was manufactured in the United States until 1980.

Mr. Derewal willingly consented to be interviewed by FBI Agent Albert G. Sproule on October 24, 1986. The interview involved allegations about Mr. Derewal's alleged purchase, sale, distribution, and importation of P2P. Mr. Derewal told Agent Sproule that Mr. Derewal had discussed with Daniel Rufe the possibility of importing P2P into the United States but had refused to assist Mr. Rufe. Mr. Derewal also stated that Mr. Rufe had previously used a truck owned by Mr. Derewal's son to transport P2P. Mr. Rufe, a close friend of Mr. Derewal for 20 years prior to this proceeding, later testified against Mr. Derewal in exchange for the Government's dropping of several charges against him.

The case against Mr. Derewal depended to a great extent on information obtained by United States law enforcement officers as a result of a wiretap placed on Mr. Derewal's home telephone in Costa Rica during the summer of 1984. The tap was placed

by Costa Rican authorities and evidence was presented to make it appear that it was authorized by a Costa Rican court. The court's order placed no limit on the duration of the wiretap.

The Costa Rican authorities sought the tap after being told by a United States DEA agent that Mr. Derewal was suspected of shipping P2P from Costa Rica to the United States. This marked the first time that the Costa Rican authorities heard Mr. Derewal's name in connection with suspected illegal drug activity.

Costa Rican police listened to tape recordings made from the tap on Mr. Derewal's phone and ultimately erased portions of the tapes that were not of interest to them. When the tap was removed, approximately two months after being installed, the Costa Rican police gave the tape to a United States DEA Agent Sandalio Gonzelez. Gonzelez admitted that he had been stationed in Costa Rica during the summer of 1984 and that, based on information obtained from United States drug enforcement agents, had informed Costa Rican police of Mr. Derewal's suspected involvement. Mr. Gonzelez accompanied Costa Rican authorities when they visited the judge who issued the wiretap and admitted at trial that there had been no probable cause, as the term is understood in the United States, for the tap.

Mr. Derewal's motion to suppress the use of the tape recordings at his trial was denied by the District Court. Numerous tape recordings obtained pursuant to the tap were played at the trial. Although P2P was not mentioned on the recordings, one tape contained a discussion regarding the truck to be used to transport the 100 gallons of the chemical. There were also references to meetings with alleged co-conspirators, trucks crossing the border and warnings by Mr. Derewal to callers not to talk to him on the telephone.

Other evidence damaging to the defense came in the form

of the surprise testimony of Peggy Turner, whose estranged husband Jonathan Dunn is one of the attorneys of record representing Mr. Derewal. Testifying for the Government, Ms. Turner stated that she had met Mr. Derewal in 1986, when she was still living with her husband. She said that Mr. Derewal talked of having arranged to bring chemicals into the United States in trucks and mentioned the name of one of his co-conspirators. The defense unsuccessfully objected to her testimony on the ground of surprise. Although the prosecution had known for weeks that Ms. Turner would testify for the Government, defense counsel did not learn that she would testify until the day she testified.

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURTS' APPLICATION OF THE "SILVER PLATTER" DOCTRINE SO AS TO PERMIT THE ADMISSIBILITY OF WIRETAP EVIDENCE OBTAINED BY FOREIGN AUTHORITIES AT THE BEHEST OF UNITED STATES LAW ENFORCEMENT OFFICIALS VIOLATES THE FOURTH AMENDMENT GUARANTEE AGAINST UNREASONABLE SEARCHES AND SEIZURES.

Permitting in most instances the admission of evidence obtained against United States citizens by foreign authorities under circumstances repugnant to the Fourth Amendment in the prosecution of a United States citizen in United States courts raises troubling issues. These issues are particularly significant in light of the federal government's announced war on drugs and the increased likelihood that American citizens will be victimized by overzealous activities of foreign and domestic drug enforcement officers in the near future. This case points up the dangers inherent in the continued application of the so-called silver platter doctrine.

A. United States officials should not be permitted to use evidence obtained by foreign law enforcement authorities against United States citizens under circumstances that would require the exclusion of that evidence under the Fourth Amendment if obtained by United States law enforcement authorities.

Federal courts have long recognized that the Fourth Amendment excludes from evidence the fruits of raids by foreign officials only if (1) the federal agents "so substantially participated in the raids so as to convert them into joint ventures between the United States and the foreign officials," *Stonehill v. United States*, 405 F.2d 738, 743 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969), or (2) "the circumstances of the foreign search and seizure are so extreme that they 'shock the judicial conscience.' " *Stowe v. Devoy*, 588 F.2d 336, 341 (2d Cir. 1978).

On the other hand, evidence presented on a silver platter by foreign officials to United States law enforcement authorities is freely admissible in United States prosecutions, even though the admission of such evidence would have violated the Fourth Amendment if gathered directly by United States authorities. The rule reflects the judicial belief that generally excluding such evidence would not deter excesses by foreign officials. *Id.*

The rule ignores the dangers inherent in permitting United States law enforcement officials to profit by the overzealous actions of their foreign counterparts. Federal courts in theory regulate the behavior of United States authorities by excluding evidence that is the product of a joint venture with foreign officials or of circumstances that shock the conscience of the court. Nevertheless, the temptation for United States officials to manipulate foreign officials to garner evidence in ways offensive to our Constitution is undeniable, particularly in cases involving the importation of illegal drugs into the United States. Federal officials at all levels of government are under enormous pressure

to stem the flow of illegal drugs from foreign nations.

In short, the continued application of the silver platter doctrine raises Fourth Amendment questions of public importance that deserve the attention of this Court.

B. The lower courts' application of the silver platter doctrine in this case departs from the guidelines established by prior decisions of this Court.

This Court has recognized that the exclusionary rule as a deterrent sanction does not apply when a foreign government commits the offending act. *United States v. Janis,* 428 U.S. 433, 455 n. 31 (1976). When agents of a foreign government conduct a search with the active cooperation of United States law enforcement authorities, however, evidence thus obtained is inadmissible. This doctrine was enunciated in *Lustig v. United States,* 338 U.S. 74 (1949), when this Court stated that

> a search is a search by a federal official if he had a hand in it; it is not a search by a federal official if evidence secured by state authorities is turned over to the federal authorities on a silver platter. The decisive factor . . . is the actuality of a share by a federal official in the total enterprise of securing and selecting evidence by other than sanctioned means.

338 U.S. at 78-79.

The lower courts in this case concluded that the evidence obtained by means of a wiretap authorized by a Costa Rican judge and put in place and monitored by Costa Rican police was admissible, although such evidence would have been excluded on Fourth Amendment grounds if it had been obtained in the same

manner by law enforcement officials in this country. Both courts concluded that the involvement of United States law enforcement authorities was not so extensive as to amount to a joint venture that would require exclusion of the evidence.

The uncontroverted facts in this case do not support this interpretation. The wiretap was sought by Costa Rican authorities only after a United States DEA agent told the Chief of the Narcotics Section of the Costa Rican police that Mr. Derewal was suspected of shipping P2P. Costa Rican authorities had no prior reason to suspect that Mr. Derewal was involved in illegal drug activities, and this was the first time that they heard his name. In all cases cited the party whose phone was tapped was either in violation of the law of this foreign county or under suspicion of violating that country's laws. Derewal was neither in violation of any Costa Rican laws nor suspected of violating any laws. United States DEA Agent Gonzelez admitted he first gave Mr. Derewal's name to Costa Rican authorities, that he accompanied Costa Rican authorities to the judge who issued the authorization for the tap, and that he later was given the tapes of the conversations recorded.

This level of involvement by Agent Gonzelez violates the standards set forth in *Lustig, supra*.

> It is immaterial whether a federal agent originated the idea or joined in it while the search was in progress. So long as he was in it before the object . . . was completely accomplished, he must be deemed to have participated in it . . . . Evidence secured through such federal participation is inadmissible.

338 U.S. at 79. The evidence that resulted in Mr. Derewal's convictions was indeed the product of a joint venture between

United States and Costa Rican law enforcement authorities and should have been excluded as a violation of the exclusionary rule under the Fourth Amendment.

II.

THE LOWER COURTS' REFUSAL TO DISMISS THE CHARGES ON GROUNDS OF GOVERNMENT DELAY DENIES MR. DEREWAL'S RIGHT TO DUE PROCESS UNDER THE FIFTH AMENDMENT.

Mr. Derewal was charged with offenses based on incidents that allegedly occurred between October 1982, and August 1984. The criminal indictment was not returned until March 8, 1988, and was kept under seal until Mr. Derewal was arrested on October 19, 1988. The lower courts concluded that this delay was permissible in the absence of a showing by Mr. Derewal that the Government had sought to obtain an advantage by its delay and that this delay was prejudicial to the defense.

This Court recognized in *United States v. Gouveia,* 467 U.S. 180 (1984) that

> the Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his evidence.

467 U.S. at 192. As a practical matter, however, this standard places an impossible burden upon a criminal defendant. Government secrecy in the preparation of criminal prosecutions generally preludes a criminal defendant from proving that the

Government's delay in bringing the indictment was the result of an improper motive.

In view of the due process implications of the continued application of this rule in criminal prosecutions, this Court should consider the appropriateness of adopting a new standard that requires the Government to demonstrate that inordinate delay in bringing a criminal prosecution is not a deliberate device to gain advantage.

III.

THE LOWER COURTS' REFUSAL TO CONDEMN THE PROSECUTION'S USE OF A SURPRISE WITNESS VIOLATED MR. DEREWAL'S RIGHT OF CONFRONTATION GUARANTEED BY THE SIXTH AMENDMENT.

The witness Peggy Turner was permitted to testify for the prosecution notwithstanding that the defense did not learn of her impending testimony until the day she took the stand. The Government justified this secrecy by claiming that Ms. Turner feared for the safety of her estranged husband, one of Mr. Derewal's attorneys. The lower courts determined that the defense was not prejudiced by this surprise.

Courts may properly refuse to compel the Government to disclose the identity of a witness when disclosure might pose a threat to the witness, *Government of Virgin Islands v. Martinez*, 847 F.2d 125, 128 (3d Cir. 1988). In addition, there is no requirement at present that the Government divulge the identity of its witnesses in a noncapital case. *United States v. Di Pasquale*, 740 F.2d 1282, 1294 (3d Cir.), *cert. denied*, 469 U.S. 1228 (1984).

Application of the above rules often results in the violation

of a defendant's Sixth Amendment right to confront in a meaningful manner the witnesses against him. The Government's stated reason for failing to apprise the defense of Ms. Turner's impending testimony — that she feared for the safety of her husband, an attorney representing Mr. Derewal at the time — was illogical and transparent. That current case law permits such Government behavior is an indication that this Court should act to safeguard the Sixth Amendment rights of the accused by enunciating meaningful guidelines that would justify nondisclosure by the Government.

Although Congress deleted the provision of the Federal Rules of Criminal Procedure that formerly required Government disclosure of the names and criminal records of witnesses, Pub. L. 94-64, § 3(23), this Court should require disclosure when the Government fails to provide reliable evidence that disclosure would jeopardize Government witnesses. Only then can a criminal defendant be effectively protected from trial by ambush.

IV.

THE DISTRICT COURT IMPROPERLY ADMITTED EVIDENCE OF UNRELATED CONDUCT THAT OCCURRED SEVERAL YEARS BEFORE THE CONDUCT GIVING RISE TO THE INSTANT CHARGES.

Two witnesses for the prosecution, Daniel Rufe and Leslie Schmidt, testified that they had manufactured methamphetamine together in 1980 and 1981. The former stated that he had obtained P2P from Mr. Derewal's farm. Both witnesses asserted that they had obtained technical information from Mr. Derewal about the manufacture of methamphetamine.

The District Court admitted this testimony over timely defense objection on the theory that the evidence showed Mr. Derewal's

knowledge and intent. Affirming, the Third Circuit concluded that the evidence was admissible under Rule 404(b) of the Federal Rules of Evidence because it satisfied the four guidelines for admissibility set forth by that court in *United States v. Scarfo,* 850 F.2d 1015, 1019 (3d Cir. 1988), *cert. denied,* 109 S. Ct. 263 (1989).

(1) The evidence of the other crime must have a proper purpose;

(2) The proffered evidence must be relevant;

(3) The probative value of the proffered evidence must outweigh its potential for unfair prejudice; and

(4) The court must charge the jury to consider the evidence of the other crime only for the limited purpose for which it is admitted.

These guidelines were set out by this Court in *Huddleston v. United States,* 108 S. Ct. 1496, 1502 (1988).

The evidence admitted in the instant case does not satisfy either guideline (2) (relevance) or (3) (prejudice) above. With regard to relevance, this Court explained in *Huddleston* that the "threshold inquiry a court must make before admitting similar acts evidence under Rule 404(b) is whether that evidence is probative of a material issue other than character." 108 S. Ct. at 1499. Noting that similar act evidence is admissible under Rule 404(b) only if it is relevant, the Court observed that such evidence is relevant "only if the jury can reasonably conclude that the act occurred and that the defendant was the actor." 108 S. Ct. 1501.

The witnesses that implicated Mr. Derewal in the alleged prior criminal activities contradicted one another with regard to

important details. Daniel Rufe testified that he had obtained P2P and certain equipment from Mr. Derewal's farm. Leslie Schmidt testified that Rufe told him that he had paid Mr. Derewal $9,000 per gallon for the P2P. On the other hand, Rufe testified that he did not pay Mr. Derewal for the P2P. In fact, Rufe stated under oath that he did not even tell Mr. Derewal about getting the P2P until after the fact. A jury could not have reasonably concluded that the act about which the witnesses testified had in fact occurred. Thus, the evidence should not have been admitted.

Finally, any probative value of this evidence was clearly outweighed by its prejudice to the defendant. The evidence gave the jury the impression that Mr. Derewal had been actively involved in similar criminal activity in the past and should therefore be convicted at least in part on the strength of that prior alleged behavior.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED OCTOBER 4, 1989

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1298

UNITED STATES OF AMERICA,

Appellee

vs.

MANFRED DEREWAL,

Appellant.

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and ALDISERT,*
Circuit Judges.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

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* As to Panel Rehearing

voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

s/ Carol Los Mansmann
Circuit Judge

APPENDIX B — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED SEPTEMBER 8, 1989

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 89-1298

UNITED STATES OF AMERICA,

Appellee,

vs.

MANFRED DEREWAL,

Appellant.

Appeal from the United States District Court for the Eastern District of Pennsylvania (Crim. No. 88-00098-01)
District Judge: The Honorable James McGirr Kelly

Submitted under Third Circuit Rule 12(6)
September 7, 1989

Before: MANSMANN, NYGAARD, and ALDISERT,
Circuit Judges.

(Filed SEP -8 1989)

MEMORANDUM OPINION OF THE COURT

ALDISERT, *Circuit Judge.*

The major question for decision is whether the district court correctly admitted evidence obtained through wiretaps conducted by Costa Rican authorities. The issue is presented in an appeal by Manfred Derewal from a sentence entered on a judgment of conviction of conspiracy to import P2P into the United States from Costa Rica, importation of the substance in March 1983, and attempted importation in July and August of 1984. Prior to trial, Derewal objected to the admissibility of certain evidence on grounds that the wiretaps were obtained in violation of Costa Rican law and the fourth amendment. We will affirm the judgment of the district court in all respects.

Benzyl methyl ketone is another name for P2P, a precursor chemical for the preparation of amphetamine and methamphetamine known in the street as "speed." Because areas within the Eastern District of Pennsylvania seem to be a major center for the preparation of these chemicals, this court has considerable experience with these cases. Importation and possession of P2P became illegal in the United States in 1980; the chemical remained legal in Costa Rica until 1988. Testimony at Derewal's trial disclosed that P2P has no legitimate commercial use other than the legitimate commercial manufacture of amphetamine and methamphetamine.

We are satisfied that the district court committed no reversible error in refusing to suppress the evidence on the ground that the wiretaps were improperly obtained. For this purpose, we accept the reasoning of the district judge. *United States v. Derewal,* 703 F.Supp. 372 (E.D. Pa. 1989).

I.

On review the factual findings underlying the district court's

order are subject to the clearly erroneous rule. *United States v. Hasagan,* 816 F.2d 899, 906 (3d Cir. 1987). The district court's legal conclusions based on these facts are subject to *de novo* review. *United States v. Perdomo,* 800 F.2d 916, 919 (9th Cir. 1986).

II.

Before us appellant contends, as he did before the district court, that it was improper to admit into evidence wiretap evidence obtained by Costa Rican officials pursuant to an order issued by a court of that nation. As the district court explained, the fourth amendment and the exclusionary rule ordinarily do not apply to searches conducted by foreign officials in foreign countries. *See United States v. Janis,* 428 U.S. 433 (1976). However, most courts have recognized two exceptions. Courts will apply the fourth amendment bar to searches in foreign countries by foreign officials where (1) United States agents are so substantially involved in the search as to convert it into a joint venture between foreign and United States officials, or (2) the actions of foreign officials "shock the conscience." *United States v. Rosenthal,* 793 F.2d 1214, 1230-31 (11th Cir. 1986), *cert. denied,* 480 U.S. 919 (1987). The trial judge carefully demonstrated that neither exception applied to the facts here. *See* 703 F.Supp. at 374-76. We agree.

III.

Derewal next argues that the district court's denial of his motion to dismiss the indictment because of pretrial delay was in error. This is reviewed for abuse of discretion. *United States v. Wagner,* 834 F.2d 1474, 1478 (9th Cir. 1987). Derewal contends that between August, 1984, when the final acts charged in the indictment occurred, and March, 1988, when the indictment was returned, the government deliberately delayed seeking an indictment in order to gain an advantage and that this delay caused

Derewal prejudice. We are satisfied that appellant has failed to make or offer the requisite evidentiary showing of prejudice or intentional delay.

To invoke the extreme sanction of dismissal of the indictment under the due process clause, the defendant must prove that the government's delay was a deliberate device to gain an advantage over him and that it caused him actual prejudice in presenting his defense. *United States v. Sebetich,* 776 F.2d 412, 430 (3d Cir. 1985), *cert. denied,* 108 S.Ct. 725 (1988). We have explained that the mere possibility of prejudice inherent in an extended delay or the mere possibility that a witness might become inaccessible is not sufficient. *United States v. Ismaili,* 828 F.2d 153, 168 (3d Cir. 1987), *cert. denied,* 108 S.Ct. 1110 (1988). Thus, the defendant is required to offer sufficient evidence of actual prejudice or show intentional delay. We conclude he did not.

IV.

Derewal next argues that the district court erred in allowing the testimony of a witness whose identity had not been disclosed to him prior to trial. We review this under the abuse of discretion standard. *United States v. Carter,* 756 F.2d 310, 312 (3d Cir. 1985), *cert. denied,* 478 U.S. 1009 (1986). On the third day of trial, the government sought to introduce the testimony of Peggy Turner. Counsel objected that he had not been informed that Turner would testify. The court then conducted a hearing outside the presence of the jury. Testimony revealed that Turner had communicated with the government for the first time shortly before trial, that she was the estranged wife of one of the appellant's attorneys, and that she was afraid of Derewal because Derewal had threatened her husband. We have held that protection of a witness provides sufficient ground for failure to disclose the witness's name prior to trial. *See Government of Virgin Islands v. Martinez,* 847 F.2d 125-28 (3d Cir. 1988). In addition, appellant makes no claim of

specific prejudice except to assert that he could not properly respond to her testimony. We are impressed, however, that the government gave defense counsel rough notes of a prior interview by the FBI with Turner thus providing counsel with possible materials for impeachment. Moreover, defense counsel was given unrestricted opportunity to cross-examine her out of the presence of the jury before her testimony. Moreover, appellant did in fact call a witness whose testimony was aimed specifically at rebutting Turner's testimony. We find no abuse of discretion.

V.

Derewal also claims that the court's decision to admit evidence under Rule 404(b), Federal Rules of Evidence, was error. We review this decision under the abuse of discretion standard. *See United States v. O'Leary,* 739 F.2d 135, 136 (3d Cir. 1984), *cert. denied,* 469 U.S. 1107 (1985). A witness testified that he had obtained P2P from appellant's farm in Bucks County, Pennsylvania and that when problems arose in the manufacturing process he contacted Derewal for advice, which he relayed to another. Derewal objected to the admission of this testimony at trial as improper evidence of another crime.

The district court held that the evidence was competent to show Derewal's knowledge and intent. It was also relevant to rebut appellant's past statements that he obtained P2P only for use in gold extraction and insecticide experiments. We do not feel that its prejudice outweighed its probative value. Under the rule, evidence of a defendant's prior crimes is admissible for purposes "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Rule 404(b) Fed. R. Evid. In *United States v. Scarfo,* 850 F.2d 1015, 1019 (3d Cir. 1988), *cert. denied,* 109 S.Ct. 263, we outlined "four guidelines" for admissibility under Rule 404(b):

1. The other crimes evidence must have a proper purpose;

2. The proffered evidence must be relevant;

3. Its probative value must outweigh its potential for unfair prejudice;

4. The court must charge the jury to consider the other crimes evidence only for the limited purpose for which it is admitted.

We are satisfied that each of the Scarfo tests was met here.

VI.

Finally, Derewal argues that there was insufficient evidence to support the conviction. The standard of review is that we must sustain the verdict "if there is substantial evidence, taking the view most favorable to the government," *United States v. Leon*, 739 F.2d 885, 890 (3d Cir. 1984). We have considered the totality of the circumstances here. We are satisfied with the summary of the evidence set forth by the government in its brief at pages 28-31. We conclude that there was sufficient evidence.

We have considered all of the contentions presented by the appellant.

The judgment of the district court will be affirmed in all respects.

TO THE CLERK:

Please file the foregoing opinion.

s/ Aldisert
Circuit Judge

APPENDIX C — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED JANUARY 9, 1989

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 88-00098

UNITED STATES OF AMERICA

v.

MANFRED DEREWAL

MEMORANDUM AND ORDER

J. M. KELLY, J. JANUARY 9, 1989

Criminal defendant Manfred Derewal (Derewal) has moved to suppress electronic surveillance evidence in a criminal proceeding in which he is being held as a pretrial detainee charged with conspiracy to import into the United States one hundred seventeen gallons of P2P in violation of 21 U.S.C. § 963, the importation of P2P and the attempt to import P2P in violation of 21 U.S.C. §§ 952(a) and 960(a)(1). Defendant Derewal objects to the admissibility of the evidence on grounds that the wiretaps were obtained in violation of Costa Rican law and defendant Derewal's Fourth Amendment rights. On December 22, 1988, this court held a full evidentiary hearing on this motion in order to establish the involvement, if any, of the United States government in the wiretap on the telephone of Mr. Derewal in Santa Cruz, Costa Rica.

Appendix C

BACKGROUND

Drug Enforcement Agency (DEA) Agent Sandalio Gonzalez testified as to the following facts. Agent Gonzalez was posted in Mexico City, Mexico as the DEA group supervisor in that city. The DEA suspected defendant Derewal was engaged in the importation of illegal drugs, P2P, into the United States from Costa Rica. During the summer of 1984, Agent Gonzalez notified the Costa Rican authorities that Mr. Derewal was being investigated by the Philadelphia DEA for illegal drug trafficking. Based on its own investigation and knowledge of the DEA investigation, the Costa Rican authorities installed a wiretap on Mr. Derewal's telephone for a period beginning in June and ending in July of 1984.[1] At the invitation of the Costa Rican authorities, Agent Gonzalez went along on June 6, 1984 with the Costa Rican officials to serve the Court Order (previously obtained by the Costa Rican police) for the wiretap on the telephone company where the equipment for the wiretap was installed. Agent Gonzalez was not present during the actual interception of the conversations. After the wiretap was removed, the Costa Rican authorities provided Agent Gonzalez with original copies of the cassette tapes of the recorded English conversations. At the request of the Costa Rican authorities, Agent Gonzalez translated the recorded conversations from English to Spanish.

According to the Government, the Costa Rican authorities initiated the wiretap and collected the cassette tapes after Agent Gonzalez tipped the authorities that Mr. Derewal was involved in illegal drug trafficking. The Government avers that the Costa

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1. Although the application for the wiretap requested authorization to tap and record Mr. Derewal's telephone for a period of one month, the Costa Rican judge granted a tap unlimited with respect to time.

Rican authorities solely installed and maintained the recording equipment involved. Agent Gonzalez' testimony and the facts as presented by the Government are not contradicted.

DISCUSSION

Neither the Fourth Amendment nor the exclusionary rule applies to searches conducted in foreign countries by foreign officials. *United States v. Staino,* 690 F. Supp. 406, 408-09 (E.D. Pa. 1988); *see United States v. Callaway,* 446 F.2d 753, 755 (3d Cir. 1971), *cert. denied sub nom De Vyver v. United States,* 404 U.S. 1021 (1972). Two exceptions to this rule have developed: (1) where the involvement of the United States officials is so extensive in the search that the United States government and the foreign government are said to be involved in a "joint venture"; and, (2) where the action taken by the foreign officials shocks the judicial conscience.[2] *Staino,* 690 F. Supp. at 409 & n.8; *Callaway,* 446 F.2d at 755; *United States v. Peterson,* 812 F.2d 486, 490 (9th Cir. 1987). Following the evidentiary hearing and a review of the record, I conclude that the DEA's involvement was insufficient to constitute a joint venture between the United States and Costa Rica.

The seminal case of *Stonehill v. United States,* 405 F.2d 738 (9th Cir. 1968), *cert. denied,* 395 U.S. 960 (1969) sets forth the framework within which this case should be analyzed. The principal relevant factors referred to in *Stonehill* needed to find a "joint venture" are not present in this case. In *Stonehill,* the court found no joint venture in a search conducted in the Phillipines despite the fact that a United States agent requested

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2. Defendant contends that both of these exceptions are applicable to this case.

that a particular building be included in the list of premises to be searched and a diagram and memorandum prepared by a United States agent was used by the Phillipines authorities. *Id.* at 741, 746. The *Stonehill* court noted that the search was instigated and planned by the Phillipine government and United States agents were given permission to copy the seized documents after they were catalogued. *Id.* at 746.

In this district, courts have applied the same *Stonehill* principles. *See, e.g., Staino,* 690 F. Supp. 406, 409; *United States v. Scarfo,* No. 88-0003, slip op. at 5 (E.D. Pa. Oct. 27, 1988). In *Scarfo,* Judge Van Antwerpen determined following an extensive hearing and review of a search conducted in the Dominican Republic that although the United States provided the Dominicans with information that led to a Dominican search of the defendant's residence, observed the arrest of the defendant, identified him for the Dominican authorities, and without solicitation, received seized goods at the Santo Domingo headquarters, no joint venture existed.[3] No. 88-0003, slip op. at 2-4.

Mr. Derewal contends that a joint venture did exist between the United States officials and the Costa Rican officials and cites to *United States v. Verdugo-Urquidez,* 856 F.2d 1214 (9th Cir. 1988) in support of this contention. Yet *Verdugo-Urquidez* does not support Mr. Derewal's position. A joint venture was found to exist in *Verdugo-Urquidez* because the following facts were present in that case that were absent in the *Stonehill* decision:

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3. This case involves a suppression motion similar to a suppression motion filed before Judge O'Neill in *Staino,* 690 F. Supp. 406.

> Here, it was the American authorities who planned and instigated the searches to secure evidence to be used in an American trial; there was no existing Mexican investigation of Verdugo-Urquidez then under way. ***But see Stonehill v. United States,*** 405 F.2d 738, 646 [sic] (9th Cir. 1968); ***cert. denied,*** 395 U.S. 960, 89 S.Ct. 2102, 23 L.Ed.2d 747 (1969). Second, the activities of the DEA took place before, during and after the search. ***But see id.*** Third, before the search began the MFJP informed the DEA that they could keep all evidence seized during the search. ***But see id.*** Fourth, it was the DEA who took the initiative in ensuring the search took place soon after Verdugo-Urquidez's arrest. ***But see id.*** Finally, when the DEA contacted the MFJP about the search, they were not only seeking assistance from the Mexican police, they were asking for permission to run their own operation.

856 F.2d at 1228.

Merely supplying a tip to a foreign law enforcement agency, which then conducts an investigation and search leading to an American prosecution does not amount to a "joint venture". ***See, e.g., United States v. Hawkins,*** 661 F.2d 436, 456 (5th Cir. 1981); ***United States v. Heller,*** 625 F.2d 594, 600 (5th Cir. 1980). Nor does the act of a United States agent serving as a language interpreter for foreign authorities convert the search into a joint venture. ***Birdsell v. United States,*** 346 F.2d 775, 782 (5th Cir. 1965), ***cert. denied,*** 382 U.S. 963 (1965).

In the instant case, the DEA's involvement was limited to

notifying the Costa Rican officials of Mr. Derewal's suspected activities. At their own initiative, the Costa Rican authorities installed a telephone wire interception on Mr. Derewal's telephone. In distinction to the circumstances in *Verdugo-Urquidez,* the United States in this case had no control or management of any aspect of the wiretap. I conclude that no joint venture can be found between the United States and Costa Rica in this case.

Defendant contends that the good faith exception to the exclusionary rule should not be extended to this case.[4] But even if this court had found that the overall involvement of the United States in the wiretap of Mr. Derewal's telephone was so substantial as to amount to a joint venture the exclusionary rule does not apply in these circumstances. The wiretap was placed pursuant to a properly obtained court order. Transcript of December 22, 1988 Hearing at 4-5. According to a Costa Rican narcotics officer, the procedures followed by the Costa Rican officials in obtaining the court order were in all respects in conformity with the usual procedures required by Costa Rican law pertaining to electronic intervention. *Id.* at 7. DEA Agent Gonzalez was specifically invited to come along by the Costa Rican officials to observe the procedure for applying for a court order. *Id.*

For these same reasons, I do not find that the conduct of the Costa Rican officials shocks the conscience of this court. *United States v. Maher,* 645 F.2d 780 (9th Cir. 1981).

An appropriate order follows.

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4. The good faith exception to the exclusionary rule created in *United States v. Leon,* 468 U.S. 897 (1984) has been extended to cases involving the reasonable reliance on the representations of foreign officials regarding the interpretation of foreign law. *See e.g., Peterson,* 812 F.2d at 491-92.

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CRIMINAL NO. 88-00098

UNITED STATES OF AMERICA

v.

MANFRED DEREWAL

ORDER

AND NOW, this 9th day of January, 1989, for the reasons set forth in the foregoing Memorandum, it is ORDERED that defendant's motion to suppress evidence is DENIED.

BY THE COURT:

s/ James McGirr Kelly
JAMES McGIRR KELLY, J.